TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 115

THE INTEROCEAN OIL COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED JUNE 26, 1925

(30,447)

(30,447)

SUPREME COURT OF THE UNITED STATES

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 23, 1924

[fol. 1] **IN THE COURT OF CLAIMS**

No. D-267

THE INTEROCEAN OIL COMPANY

v.

THE UNITED STATES

I. PETITION—Filed April 2, 1924

To the Honorable the Court of Claims:

The Claimant, The Interocean Oil Company, respectfully represents:

I. Claimant is a corporation duly organized according to law, and on and prior to April, 1918, was engaged in refining, transporting and dealing in petroleum and petroleum products, chiefly fuel oil, in Carteret, in the Borough of Roosevelt, Middlesex County, New Jersey, it being the owner of certain real estate consisting of, to wit, seventeen (17) acres, and known as the Interocean Oil Company holding, situated on the south side of Rahway Avenue, running south for a distance of nine hundred (900) feet, more or less, on Staten Island Sound, together with improvements thereon consisting of an oil refinery with storage tanks and various appurtenances thereto, this real estate and physical improvements then and there being worth at least the sum of Four Hundred and Forty Thousand ($440,000.00) Dollars.

II. During, to wit, January, 1918, when the Quartermaster Department, United States Army, was established in Baltimore, Mary- [fol. 2] land, to aid in supplying army transports with fuel oil during the war with Germany, Claimant was represented in that city by Harold F. Brown, in the sale of fuel oil to the Shipping Board and the United States Navy, and said Brown learned that the Quartermaster Department, United States Army at Baltimore, Maryland, required fuel oil for their transports, and arrangements were made by him with Major John Hervey Ross, Quartermaster Department, United States Army, acting under the directions of Colonel Amos W. Kimball, in charge, for the purchase by the Quartermaster Department of fuel oil for transports. Difficulty had been experienced by the Government in obtaining at Baltimore, fuel oil satisfactory for the army transports, and under the direction of Major Ross, experiments were made by mixing the heavy gravity oil of the Claimant and the light gravity oil of the Standard Oil Company which resulted in obtaining a satisfactory grade of fuel oil. Major Ross then directed said Brown, Agent of the Claimant, to be prepared to furnish the full amount of fuel oil requirements of the Quartermaster Department, and he, the said Ross, was solicitous lest the amount of storage for fuel oil at the refinery of the Claimant at Baltimore might not be

ample for their purposes in case the Quartermaster Department should need more fuel oil than they were taking at that time. All the Army transports operating from the port of Baltimore were fuel oil burners and were large passenger-carrying vessels, some carrying both supplies and troops. Major Ross repeatedly demanded more storage for fuel oil at Baltimore and he was told by said Brown that Claimant could not purchase material for the erection of tanks for the storage of oil at that time as the available supplies of steel plates were in demand [fol. 3] for other war purposes and were carefully guarded and distributed by the Government. These conversations developed the fact that the Claimant owned at Carteret facilities for the storage of over 100,000 barrels of oil which might be dismantled, shipped to Baltimore and re-erected on the property of the Claimant there. The removal of the storage tanks was then demanded by Major Ross.

III. On, to wit, April 7, 1918, Major Ross, acting under orders of Colonel Amos W. Kimball, United States Army, in charge of the Quartermaster Department, Baltimore, Maryland, visited the general offices of the Claimant, 90 West Street, New York City, New York, and informed Mr. R. R. Govin, President of the Interocean Oil Company, in the presence of Mr. R. G. Upham, Vice President, and Mr. G. W. S. Whitney, of the said Interocean Oil Company, the Claimant in this cause, that the Quartermaster Department was short of fuel oil at the port of Baltimore, Maryland, and stated that it was impossible to increase the fuel oil facilities there without additional tankage and that he, Major Ross, would have to take the tankage of the Claimant then at Carteret, New Jersey, and remove the same to Baltimore, Maryland, as an exigency of war; therefore that the Carteret Station must be abandoned at once and the equipment forwarded to Baltimore to enlarge the storage capacity for fuel oil there and that if Claimant was willing to transfer these tanks on behalf of and for the use of the Government such action would be entirely satisfactory to the Quartermaster Department; but in case of the refusal of the Claimant to comply with this demand he, Major Ross, stated that the Quartermaster Department would seize the tanks and forward them to Baltimore. [fol. 4] Major Ross further assured Claimant that such service involving all expense incurred, including transportation, the use and value of the property and all losses of whatsoever nature that should be sustained would be paid by the Government. Claimant, by its President, R. R. Govin, explained to Major Ross that this action would mean the destruction of the established business of the Interocean Oil Company, the Claimant, in New York, and Mr. R. D. Upham, Vice-President, and Mr. Geo. W. S. Whitney, Secretary, respectively, of said Interocean Oil Company, being called in, the conversation as stated in the foregoing was repeated in their presence and Major Ross assured these officers of the Interocean Oil Company, the Claimant, that the said Interocean Oil Company would be compensated for all loss and damage, and furthermore that if said Claimant did not undertake to transport the equipment to Baltimore and to re-erect it there, the property would be seized by the Quartermaster Department and the Quartermaster Department would itself undertake the work

of removal. He desired, however, that this work of removal should be performed by the Claimant because of the superior knowledge and skill of its employees for doing such work rapidly. The fact that all verbal orders given by Major Ross to Mr. Harold F. Brown, the Claimant's agent at Baltimore, Maryland, were always confirmed by written orders, convinced the Claimant that Major Ross was acting within the scope of his authority, the removal of the oil tanks being for the same general purpose of obtaining fuel oil supplies as were other orders Major Ross had given verbally and in due time had followed up with confirmatory written orders. Major Ross on this occasion stated in unequivocable language that in making this demand he was authorized to act for the War Department and that [fol. 5] written official confirmation of his orders for the removal of the plant to Baltimore, Maryland, would be forthcoming from the War Department. Confidence was expressed by every one present on this occasion that the Claimant could remove the tanks from Carteret and re-erect them in Baltimore, Maryland, more promptly than could the Government.

IV. Prior to the time of the meeting of Major Ross, Mr. R. R. Govin, Mr. R. D. Upham and Mr. G. W. S. Whitney in the general office of the Claimant at 90 West Street, New York City, New York, on, to wit, April 7, 1918, referred to in the foregoing paragraph, and for a period of several months theretofore, Major Ross had made numerous and sundry purchases of fuel oil at Baltimore, Maryland, from the Claimant, almost all of which orders were given by him verbally to Mr. Harold F. Brown, agent of the said Claimant, and acted upon by said Brown promptly, written confirmation of such orders in each case being furnished to the said Brown at a later date, and in every case the written orders confirming the verbal orders were in exact conformity with the verbal orders and prompt payment for fuel oil supplies was made in every case. So accustomed was Mr. Brown and other representatives of the Claimant to act with promptness upon all verbal orders issued by Major Ross, who assured them that he was acting under the authority of Colonel Kimball, who was duly authorized by the Quartermaster Department of the United States Army to do all things necessary to obtain the prompt delivery of fuel oil for the government transports, that said Brown had come to comply without question to every order received by him from Major Ross, depending upon future confirmation of such orders in writing which he always received.

[fol. 6] V. Major Ross had informed said Brown, agent of the Claimant, that if any of his orders were not promptly complied with the Quartermaster Department would requisition the plant of the Claimant at Baltimore and take over its operation, and all of his acts being confirmed by written orders gave ample evidence that he possessed a broad scope of authority and that he was acting within his authority and had power to force immediate compliance with his demand to take over the plant of Claimant on behalf of the War Department; and when the agent of the Standard Oil Company at Baltimore hesitated about sending Standard light fuel oil to the

plant of the Claimant to be mixed with Claimant's heavy fuel oil, Major Ross threatened to commandeer the Standard Oil supplies if his orders were not promptly obeyed, and that threat obtained prompt compliance by the representative of the Standard Oil Company, this incident confirming in the mind of said Brown, agent of the Claimant, that Major Ross had power to completely control his actions in respect to the delivery of fuel oil supplies.

VI. When Major Ross gave verbal orders for the removal of the oil storage tanks from Carteret to Baltimore, he stated that he was acting for the War Department under competent authority and that he would furnish satisfactory confirmatory orders in writing to this effect and later when his attention was called to his failure to do so, he stated that such failure had resulted from his oversight and promised that these written confirmatory orders would at once be forthcoming from Colonel Kimball and furthermore that everything he was doing was in compliance with official action by the War Department.

[fol. 7] VII. Later Major Ross stated that he had made out and delivered these confirmatory written orders to Colonel Kimball and that said Colonel Kimball would sign and deliver them to Claimant, as evidence that proper official authority was being exercised. However, about that time the said Colonel Kimball was separated from the service of the War Department and, going abroad in ill health died without ever having delivered such confirmatory written orders to Claimant.

VIII. Removal by Claimant of the storage tanks from Carteret, New Jersey, to Baltimore, Maryland, was begun with all dispatch and was far advanced when the signing of the Armistice, November 11, 1918, made their use unnecessary for the purpose of the War Department, and they were not re-erected and in condition for use at Baltimore, Maryland, until, to wit, February, 1919.

IX. Upon the close of hostilities by the Armistice of November 11, 1918, when the Claimant desired to re-establish its oil plant at Carteret, it found itself unable to do so because of the provisions contained in the New Jersey Municipalities Act (Chapter 152 Laws of 1917), this legal obstruction causing a total inability to further utilize that property for oil refining purposes, resulting in the complete destruction of the franchise of the Claimant.

X. After the removal of said oil storage tanks and the dismantling of the plant of the Claimant in the Borough of Roovsevelt, the Borough Council of Roosevelt by an act entitled "An Ordinance to Provide for the Protection of Life and Property from Fire, Explosion and Other Damages," gave effect to the New Jersey Municipal Act [fol. 8] (Chap. 152 Laws of 1917), thus giving official expression to its purpose to enforce provisions of Laws of 1917 in respect to the storage of inflammable materials, etc., in conformity with its known policy of which there had been common knowledge within the Borough of Roosevelt, from the time of the removal of the Claimant's

plant from Carteret to Baltimore, Maryland, and was in the nature of a warning to the Claimant not to attempt to reestablish its plant in the Borough of Roosevelt, thereby greatly decreasing the value of said property which could not longer be used for the purpose of an oil refinery which was the most valuable use to which it could be put.

XI. The Clerk of the Council of the Borough of Roosevelt stated as shown in Exhibit 1, attached hereto, that had not the Claimant's plant been removed from Carteret, it would not have been interfered with by the Council; it having been established legally for oil refining purposes as early as 1913 with the consent of said Municipal Council; but its removal having come to the attention of the Council, said Council let it be known that it was ready at all times to pass a prohibitive ordinance whenever any attempt should be made by the Interocean Oil Company, the Claimant, to reestablish its oil refining plant at Carteret, and Claimant had full knowledge of this intention of said Council of the Borough of Roosevelt, and said Council did on March 13, 1922, enact the ordinance it had been prepared to enact at all times after the removal of the plant of the Claimant, this action being taken under the authority of the New Jersey Municipalities Act (Chapter 152 Laws of 1917).

XII. As a result of the removal of its plant from Carteret, New [fol. 9] Jersey, to Baltimore, Maryland, Claimant not only having suffered loss in the decreased value of its real estate holdings by reason of the inhibition of the Council of the Borough of Roosevelt in preventing the use of this property for oil refining purposes, which was the chief value of the site because of its proximity to the port of New York, no other site being available, but the Claimant has also lost its own right to carry on the business of oil refining at Carteret and this franchise to conduct its business near the port of New York had a large value, aggregating to wit $1,000,000.

XIII. While Claimant believes and therefore avers that the facts aforesaid entitle it to recover under its said verbal contract with the War Department, if the Court shall deem that such a promise was not binding, it further claims, in the alternative, that it is entitled to a reasonable compensation for the services rendered and for the damage sustained by it in complying with the demands of the War Department in time of war in the furnishing of necessary facilities for supplying fuel oil for the efficient conduct of the war.

XIV. No other action is now pending, nor has any other action been had, on said claim in Congress or in any of the departments; no person other than the Claimant is the owner thereof or interested therein; no assignment or transfer of this claim, or any part thereof or interest therein, has been made; the Claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the Claimant has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the Government. The Claimant is a citizen of the United [fol. 10] States and the Claimant therefore claims:

1. Actual expense incurred in taking down plant at Carteret, freight to Baltimore, Md., and its re-erection at Baltimore	$53,697.21
2. Depreciation in the value of its real estate remaining at Carteret, N. J., removal of said four oil tanks and subsequent legal obstructions prohibiting the re-establishment of the oil refinery at Carteret, N. J.	220,740.00
3. Loss of franchise to conduct business of Claimant at Carteret resulting from the removal of the plant and the subsequent passage of the ordinance of the Borough of Roosevelt forbidding a resumption of the former use of the plant as an oil refinery	1,000,000.00
4. Loss of labor, material etc., being the difference between original cost of equipment sent to Baltimore and the value of the plant at cost shipped	7,820.52
5. Our crude oil storage at Carteret, N. J. refinery was 120,000 barrels. Of this 70% or 84,000 barrels, was available for use for fuel oil sales. A minimum turnover of twice a month would amount to 168,000 barrels or 7,056,000 gallons (42 gallons per barrel) per month and could have been marketed. The profit on these sales would have been ½ cent per gallon or $35,280 per month, a total of $423,360 per year, and for the period April, 1918, to October 1, 1923	2,293,200.00
Total loss of	$3,575,457.73

(Signed) John Paul Earnest, Attorney for Claimant.

[fol. 11] Jurat showing the foregoing was duly sworn to by R. D. Upham omitted in printing.

[fol. 12] COURT OF CLAIMS

INTEROCEAN OIL CO. EXHIBIT No. 1

I, Walter V. Quin, being first duly sworn deposes and says, that I was Borough Clerk of Roosevelt, Middlesex County, New Jersey, for thirteen years ending 1922; that had the Interocean Oil Company, after the removal of its plant from Carteret in 1918, attempted to reinstate said plant or any similar oil refining plant on the site previously occupied by it, in Carteret, such reinstatement would have been prohibited by the Borough Council in conformity with the terms of the ordinance of March 13, 1922, based on Chapter 152 Laws of 1917 State of New Jersey. Furthermore, it was the purpose of the Council of the Borough of Roosevelt and known

to the Interocean Oil Company, from the time the oil refining plant of the Interocean Oil Company was removed from Carteret until the passage of the ordinance of March 13, 1922, that the Borough Council would prohibit the reestablishment of its oil refining plant on the site it formerly occupied.

(Signed) Walter V. Quin.

Subscribed and sworn to before me this 20th day of November, 1923. (Signed) Julia Mitchell, Notary Public, Bronx County, No. 29. New York County Clerk's No. 225. Register's No. 5257. Term expires Mch. 30, 1925. (Seal.)

[fol. 13] II. Defendant's Demurrer—Filed Apr. 25, 1924

Defendant demurs to the above-entitled petition for the reason that it does not state a cause of action against the United States.

Robert H. Lovett, Assistant Attorney General. W. F. Norris, Special Assistant to the Attorney General.

III. Argument and Submission of Demurrer

On May 19, 1924, the demurrer in this case was argued and submitted by Mr. W. F. Norris, for the defendant, and by Mr. John Paul Earnest, for the plaintiff.

[fol. 14] IV. Order of Court Sustaining Defendant's Demurrer and Dismissing Petition

This cause was submitted upon the defendant's demurrer to the plaintiff's petition. Upon consideration whereof the court is of the opinion that said demurrer is well taken. It is therefore ordered this 26th day of May, 1924, that the defendant's said demurrer be and the same is sustained, and the petition is dismissed.

By the Court.

V. Plaintiff's Application for and Order Allowing Appeal

From the judgment rendered in the above-entitled cause on the 26th day of May, 1924, in favor of defendant, the plaintiff, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

John Paul Earnest, Attorney for Plaintiff. Charles E. Kern, of Counsel.

Ordered: That the above application for appeal be allowed as prayed for.

By the Court.

Entered June 16, 1924.

[fol. 15] COURT OF CLAIMS OF THE UNITED STATES

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case on demurrer; of the order of the court sustaining the defendant's demurrer and dismissing the petition; of the plaintiff's application for appeal and of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this Twenty-fourth day of June, A. D. 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of the Court of Claims.)

Endorsed on cover: File No. 30,447. Court of Claims. Term No. 482. The Interocean Oil Company, appellant, vs. The United States. Filed June 25th, 1924. File No. 30,447.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1925.

No. [redacted] 115

THE INTEROCEAN OIL COMPANY, APPELLANT,

vs.

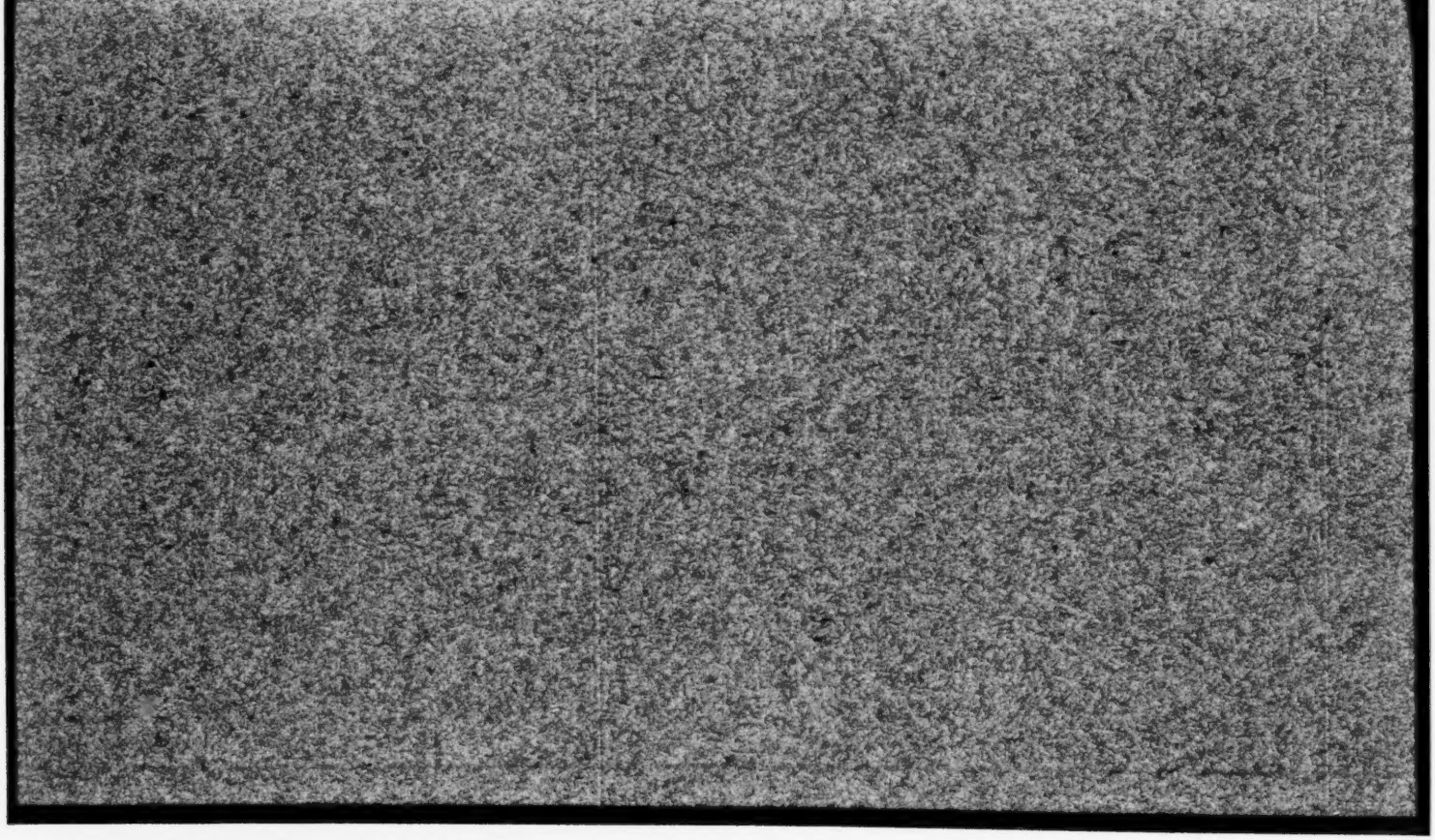
THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

JOHN PAUL JARRETT,
Attorney for Appellant.

CHARLES E. KERN,
Of Counsel.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 482.

THE INTEROCEAN OIL COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

This is an appeal from a judgment of the Court of Claims dismissing the petition of appellant upon demurrer filed thereto by the United States on the ground that said petition does not state a cause of action against the United States (Record, p. 7).

Statement of Facts.

The appellant, The Interocean Oil Company, is a corporation engaged in refining, transporting, and dealing in petro-

leum and products of petroleum, chiefly fuel oil, at Carteret, N. J., and owned about seventeen (17) acres of land situated on Staten Island Sound, with improvements thereon, consisting of an oil refinery with storage tanks and various appurtenances, of an aggregate value of at least $440,000.00 (Record, p. 1, par. 1).

Appellant also owned an oil refinery at Baltimore, Md., where is was represented by Harold F. Brown, and during January, 1918, and subsequent thereto sold fuel oil to the United States Shipping Board and the United States Navy for the use of the Army transports carrying passengers, supplies, and munitions to our troops in the war with Germany. Arrangements for the sale of the fuel oil were made with Maj. John Hervey Ross, of the Quartermaster Corps of the Army, acting under the orders of Col. Amos W. Kimball, who was in charge of such purchases of fuel oil for the Army transports. Fuel oil suitable and necessary for use by such transports was secured by a combination of the heavy oil of the appellant with the light oil of the Standard Oil Company of New Jersey, the experiments to secure which were made in the laboratories of the appellant, thus obtaining a satisfactory grade of fuel oil (Record, p. 1, par. 2). When this problem was solved, Major Ross ordered said Brown to be prepared to furnish all the fuel oil the Quartermaster Corps might need, and this was done to the limit of the capacity of the Baltimore plant of the appellant.

As all the Army transports operating from Baltimore were fuel-oil burners and needed great quantities of oil, Major Ross demanded additional storage for oil at appellant's plant at Baltimore, as he feared the facilities for this purpose were not sufficient for the oil needed, and he was told by said

Brown that appellant could not purchase material for the erection of additional tanks at Baltimore as the available supplies of the steel plates necessary for the tanks were in demand for other war purposes and were carefully guarded and distributed by the Government. These conversations developed the fact that appellant owned an oil refinery at Carteret, N. J., with tanks there capable of storing over 100,000 barrels of oil, whereupon Major Ross ordered that these tanks at Carteret be dismantled, shipped to Baltimore, and re-erected on the property of the appellant at Baltimore (Record, p. 2, par. 2).

On April 7, 1918, Major Ross, acting under orders of Colonel Kimball, who was in charge of the Quartermaster Corps at Baltimore, Md., went to the offices of the appellant, 90 West Street, New York City, and informed Mr. R. R. Govin, president of the Interocean Oil Company, in the presence of Mr. R. D. Upham, vice-president, and Mr. G W. S. Whitney, an official of the company, that he would have to take the tankage at Carteret and remove it to Baltimore as an exigency of war; that he preferred that the appellant should do this work, but in case of its refusal the property would be commandeered, transported, and re-erected at Baltimore, Md., by the Government. The said officers of the company called Major Ross' attention to the fact that such a transfer would destroy the company's business in New York, and that the plant, if removed from Carteret, could never be re-erected there, but Major Ross assured them that he was acting under competent direction and authority of the War Department, and that all services involved and all expenses incurred and damages suffered by the company would be paid for by the Government, and

that written confirmation of his verbal orders would be forthcoming. Appellant had on many occasions supplied fuel oil on such verbal orders given by Major Ross prior to this time and all his orders had been confirmed in writing and the fuel oil so furnished had been paid for by the Government, thus confirming the authority of Major Ross to act for the War Department. Written confirmation of the order to remove the tanks was never received, although Major Ross assured the officials of the company that he had made out such orders and delivered same to Colonel Kimball for signature and delivery to appellant, but Colonel Kimball shortly thereafter was separated from the service because of ill health and went abroad, where he died without ever having delivered such confirmatory written orders to appellant (Record, pp. 2, 3, 4, pars. 3-7).

Realizing that under the law the Government had the power to commandeer the property and believing from the statement of Major Ross that it would do so, and also believing that all expenses incurred and damages suffered by the appellant would be paid for in accordance with the assurance of Major Ross, appellant began at once to take down its tanks at Carteret and shipped them to Baltimore at an expense to appellant of $53,697.21, but the tanks were not fully re-erected at Baltimore when the armistice of November 11, 1918, rendered their use unnecessary for the purposes of the War Department, and the completion of the work was not accomplished until February, 1919 (Record, p. 4, par. 8).

When appellant undertook to re-establish its plant at Carteret after the close of hostilities, it was unable to do so. The Legislature of the State of New Jersey had, previous

to the removal of the tanks, passed an act (chap. 152, Laws of 1917), which was given effect by the Borough Council of Roosevelt, in which Carteret is situated, prohibiting the re-erection of the plant. Had the plant not been removed, this act would not have applied and the appellant could have occupied and developed its property indefinitely without molestation, as it had gone to Carteret in 1913 and developed its plant with the consent of the municipality. No other adequate site near New York could thereafter be secured for the purpose of an oil refinery and the appellant has lost its franchise as a direct result of the removal of its plant, and has suffered a severe loss in the depreciation of its real estate at Carteret, which was chiefly valuable for an oil refinery (Record, pp. 4, 5, pars. 9-14).

Appellant has been paid nothing and seeks to recover the amount actually expended by it in taking down and transporting the tanks to Baltimore ($53,697.21), and also for the loss of its franchise, depreciation of its real estate, etc., all of which are the direct result of the removal of the plant at the demand of the Government for war purposes (Record, p. 6).

ARGUMENT.

I.

In discussing this case and the theory upon which it is brought, the situation of our country in April, 1918, must be kept in mind. We were in the midst of the greatest war the world has ever known. Two millions of our men were in Europe dependent upon our Government for supplies of all kinds. The National Defense Act approved June 3,

1916, was in full force and effect to secure the efficient prosecution of the war.

The argument upon the demurrer to the petition of appellant in the Court of Claims was placed upon three grounds:

(1) No contract between the United States and appellant.

(2) Major Ross not authorized to direct dismantling of storage tanks at Carteret, N. J., and removal of same to Baltimore.

(3) No contract made in compliance with Section 3744, Revised Statutes.

Discussing the third objection first, viz., that no formal contract was made in compliance with Section 3744, Revised Statutes, our answer is that such contract was not required under the facts and circumstances of this case under repeated decisions of this Court, where, as in this case, there was a partial performance of the contract by the appellant.

Clark *vs.* United States, 95 U. S., 539.

Harvey *vs.* United States, 105 U. S., 671.

United States *vs.* Andrews, 207 U. S., 229.

United States *vs.* New York & Porto Rico Steamship Co., 239 U. S., 88.

In the Clark case, first referred to, Mr. Justice Bradley, in discussing the application of Section 3744, Revised Statutes, to Government contracts, said (p. 542):

> "We do not mean to say that where a parole contract has been wholly or partly executed and performed on one side, the party performing will not be entitled to recover the fair value of his property or services. On the contrary, we think that he will be permitted to recover such value as upon an implied contract for a *quantum meruit*."

In United States *vs.* Andrews (*supra*), Mr. Chief Justice White said (p. 243):

> "Lastly, it is urged that in any event, the court below (Court of Claims) erred, since the contract in question was not reduced to writing and signed by the contracting parties with their names at the end thereof, as required by Rev. Stat. 3744, U. S. Comp. Stat. 1901, p. 2510. But it is settled that the invalidity of a contract because of a non-compliance with the section referred to is immaterial after the contract has been performed."

The National Defense Act approved June 3, 1916, in Section 9 empowers the Quartermaster Corps to procure all necessary supplies for the successful prosecution of the war, and Section 120 of said act provides that "the President in time of war or when war is imminent is empowered through the head of any Department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any corporation for such product or material as may be required," etc. Compliance with such orders is obligatory. If the order is refused, the property needed may be taken by the Government and failure to comply "shall be deemed a felony and upon conviction punished by imprisonment not more than three (3) years and by a fine not exceeding $50,000." The compensation to be paid by the Government "shall be fair and just."

Passing now to a consideration of the first and second grounds of the demurrer to the appellant's petition in the Court of Claims, viz., that no contract existed between the United States and appellant, and that Major Ross had no authority to direct the dismantling and removal of the tanks,

we respectfully submit that there was a contract, express or implied, which this Court will recognize and enforce. Major Ross stated to appellant that his authority was complete, and that written confirmation to support his demand under the National Defense Act would be furnished the appellant in the case of this order as it had been in the matter of the sale of fuel oil. That Major Ross did have authority from the War Department to purchase oil by verbal orders is conclusively shown by the fact that in each case his verbal order was confirmed by the War Department and the oil furnished by the appellant on such orders was paid for by the Government, thus confirming the authority of Major Ross to give such orders. But that there was an implied promise to indemnify the appellant for all loss and damages suffered by the dismantling and removal of the tanks on the order of an officer of the Government in time of war is beyond question.

In United States *vs.* Russell, 13 Wallace, 623, this Court held that—

The taking of private property by the Government when the emergency of the public service in time of war or impending danger is too urgent to admit of delay, raises an implied promise to indemnify the owner.

In this case (at pp. 627 and 628), Mr. Justice Clifford said:

> "Extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized or appropriated to the public use, or may even be destroyed without the consent of the owner. Unques-

tionably such extreme cases may arise, as where property taken is imperatively necessary in time of war to construct defenses for the preservation of a military post at the moment of an impending attack by the enemy, or for food or medicine for a sick and famishing army utterly destitute and without other means of such supplies, or *to transport troops, munitions of war,* or *clothing to reinforce* or *supply an army in a distant field* where the necessity for such reinforcement or supplies is extreme and imperative * * *

"Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right and it is clear that the emergency must be shown to exist before the taking can be justified. Such a justification may be shown, and when shown, the rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the Government is bound to make full compensation to the owner."

In United States *vs.* Great Falls Manufacturing Co. (112 U. S., 645), this court held:

Where property to which the United States asserts no title is taken by its officers or agents pursuant to an act of Congress, as private property for the public use, the Government is under an implied obligation to make just compensation to the owner.

Mr. Justice Harlan delivered the opinion of the Court in this case and said (p. 659):

> "In the present case there was, it is true, no statutory proceedings for the condemnation of the claimant's property rights * * * the Government did not assert title in itself to this property at the time it

> was taken. * * * In such a case, it is difficult to perceive why the legal obligation of the United States to pay for what was thus taken pursuant to an act of Congress is not quite as strong as it would have been had formal proceedings for condemnation been resorted to for that purpose."

II.

We respectfully submit, also, that the provisions of the Fifth Amendment to the Constitution are applicable to the facts in this case.

In Monongahela Navigation Co. *vs.* United States, 148 U. S., 312 (1892), where the Federal Government had condemned for public use certain property of the company, this Court held that the Government must return the exact equivalent for it to the Company.

Mr. Justice Brewer said (p. 325):

> "The language used in the Fifth Amendment in respect to this matter is happily chosen. The entire amendment is a series of negations, denials of right or power in the Government, the last, the one in point here, being 'Nor shall private property be taken for public use without just compensation.' The noun 'compensation' standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done and the latter imposed by way of punishment. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the

> equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of these two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken."

And, again, at page 327, the Court says:

> "The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public taking the property through Congress, or the legislature, its representative, to say what compensation shall be paid or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and ascertainment of that is a judicial inquiry."

The Fifth Amendment to the Constitution declares that "private property shall not be taken for public use without just compensation." As a result of this provision the citizen must acquiesce in the power of the Government to take his property for public use whenever the needs of the Nation demand it, and the Government agrees that when the property of the citizen is so taken just compensation shall be made. This constitutes a compact between the citizen and the Government and each party to this compact is bound thereby.

In Boyd *vs.* United States (116 U. S., 616, at p. 635), Mr. Justice Bradley said:

> "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of

> procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property *should be liberally construed*. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon."

And it is well settled that the existence of a state of war does not suspend the guaranties of the Constitution.

In United States *vs.* Cohen Grocery Co., 255 U. S., at p. 88 (1921), this Court said:

> "We are of opinion that the Court below was clearly right in ruling that the decisions of this Court indisputably established that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments as to questions such as we are here passing upon."

Congress established the Court of Claims as a legal tribunal to which the citizen could go to recover compensation for his property so taken by the Government.

Section 145 of the Judicial Code provides:

> "The Court of Claims shall have jurisdiction to hear and determine the following matters: (1) Claims against the United States: First, all claims (except for pensions) founded upon the Constitution of the United States, or any law of Congress, upon any regulation of an Executive Department, upon any contract express or implied, with the

> Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a Court of Law, Equity, or Admiralty, if the United States were suable."
>
> (U. S. Compiled Statutes, 1918 Ed., Sec. 1136.)

The National Defense Act approved June 3, 1916, gives to the Quartermaster Corps, in Sections 9 and 120 thereof, the duty of procuring all necessary supplies for the conduct of the war, and provides that demands made by the Government upon individuals, companies, or corporations must be promptly complied with, and upon a failure to comply the property needed shall be taken by the Government and punishment visited upon those failing to comply. The language of said act on this point is as follows:

> "And any individual, firm, company, association, or corporation, or organized manufacturing industry, or the responsible head or heads thereof, failing to comply with the provisions of this Section (120) shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and by a fine not exceeding $50,000."

This Section 120 also provides for compensation which "shall be just and fair."

Under the circumstances of the state of war existing in April, 1918, appellant was fully justified in co-operating with the Government. It was its duty to do so. It realized that if it failed to do so the Government could and would

take its property, as Major Ross said, and a refusal to comply with the Government's orders would subject the officials of the corporation to a criminal prosecution.

In United States *vs.* Lynah, 188 U. S., 445 (1902), this Court said (p. 465):

> "All private property is held subject to the necessities of Government. The right of eminent domain underlies all such rights of property. The Government may take personal or real property whenever its necessities or the exigencies of the occasion demand. So the contention that the Government had a paramount right to appropriate this property may be conceded, but the Constitution in the Fifth Amendment guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised, it shall be attended by compensation."

We respectfully call attention to the fact, also, that to sustain an action against the Government in the Court of Claims for such a taking of private property it is not essential even that the taking should have been in pursuance of an act of Congress.

As this Court says in the Lynah case (*supra*):

> "In United States *vs.* Berden Fire Arms Manufacturing Co., 156 U. S., 552, a judgment of the Court of Claims against the United States on an implied contract for the use of an improvement in breech-loading firearms was sustained *although there was no act of Congress expressly directing the use of such improvements.*" 188 U. S., at p. 464 (1912).

And the fact that no price was fixed or agreed upon is of no moment:

> "That no price was agreed upon, or that the officers of the Government were not authorized to agree upon a price is immaterial. No price was fixed in United States *vs.* Palmer (*supra*) or in United States *vs.* Russell, 80 U. S., —; 13 Wallace, 623. The question is whether there was a contract for the use, and not whether all the conditions of the use were provided for in such contract." U. S. *vs.* Berden Co., 156 U. S., at p. 569 (1894).

The trend of the decisions of this Court is unquestionably in favor of the allowance of just compensation to the citizen for his property taken or used by the Government for a public purpose. In a recent case (U. S. *vs.* Bethlehem Steel Co., 258 U. S., 321 (1922), this Court said, at page 326:

> "There is but one question in the case and that is the attitude of the Ordnance Bureau representing the United States toward the Leibert patent whether in recognition of it, as contended by the Steel Company, or in opposition to, or, it may be said in tortious use of it, as contended by the United States."
>
> "We have in other cases expressed our aversion to the latter conclusion except upon explicit declaration or upon a course of proceedings tantamount to it. A contract, express or implied, in fact must, it is true, be established, but one to pay for a mechanism used will be implied rather than a tortious appropriation of it—rather than the exercise by the United States of its sovereignty in aggression upon the rights of its citizens."

By far the greatest loss to the appellant was the loss of its franchise at Carteret. We have attached to the petition, as an exhibit, the affidavit of Walter V. Quin, borough clerk of Roosevelt, Middlesex County, N. J., in which Carteret is located, which shows that the borough council would not permit the re-establishment of the oil-refining plant on the site it formerly occupied, which was the only property owned there by the appellant (Record, pp. 6 & 7), and that this fact was known to the appellant at the time the Government demanded the removal of the plant to Baltimore.

That a franchise is property has been held by this Court in West River Bridge Co. *vs.* Dix, 6 Howard, 507, in which case Mr. Justice Daniel says, page 534:

> "A franchise is property and nothing more; it is incorporeal property and is so defined by Justice Blackstone * * * It is its character of property only which imparts to it value, and alone authorizes in individuals a right of action for invasions or disturbances of its enjoyment."

Again, in Monongahela Navigation Company *vs.* United States (*supra*), this Court held that the company was entitled, under the provisions of the Fifth Amendment to the Constitution, to recover compensation from the United States for the taking of the franchise to exact tolls as well as for the value of the tangible property taken, and that the assertion by Congress of its purpose to take the property which that company had constructed did not destroy the franchise granted.

The value of a franchise is a question of fact and is capable of being established by competent evidence. The loss of the

franchise of appellant was the direct result of the taking of its property by the Government for war purposes. It is not only the duty of a citizen, but it is a privilege, to help the Government to the limit of his ability in every emergency, and especially such as existed in 1918, but no corporation could afford to do so unless assured of a just compensation for the services rendered or the property taken, because of the fact that the officers of a corporation must protect the interest of its stockholders, to whom they bear the relation of trustees, and to do otherwise would be a violation of their trust. And it is respectfully submitted that a policy of helpful co-operation from its citizens at all times is fostered by a liberal attitude on the part of the Government toward the citizens who have tried to help the Government in an emergency, where property of the citizen, to which the Government claims no title, has been taken for public use.

The judgment of the Court of Claims should be reversed.

Respectfully submitted,

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Of Counsel.

INDEX

AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 115

THE INTEROCEAN OIL COMPANY, APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

No opinion was filed by the Court of Claims.

JURISDICTION

This is an appeal from a judgment of the Court of Claims entered May 26, 1924, sustaining a demurrer filed by the United States, and dismissing the petition upon the ground that it does not state a cause of action. (R. 7.)

The appeal was allowed by the Court of Claims on June 26, 1924 (R. 8), and comes to this Court under Section 242 of the Judicial Code, in force at that time.

THE FACTS

The petition alleges, with much detail, facts and conclusions which may be summarized as follows:

The claimant corporation, on and prior to April, 1918, was engaged in refining, transporting, and dealing in petroleum and petroleum products—chiefly fuel oil—in Carteret, New Jersey, where it owned and operated a refinery and storage tanks valued at $440,000. (R. 1.) Claimant also operated a refinery at Baltimore, Maryland. (R. 1.)

During January, 1918, claimant was represented in Baltimore by Harold F. Brown in the sale of fuel oil to the Shipping Board and to the United States Navy. (R. 1.) Brown made arrangements with Major Ross, Quartermaster Department, United States Army, acting under the direction of Colonel Kimball, in charge, for the purchase by that department of fuel oil for army transports. (R. 1.)

After experimentation made by claimant under the direction of Major Ross, a satisfactory grade of fuel oil was obtained by mixing the heavy gravity oil of claimant with the light gravity oil of the Standard Oil Company. (R. 1.)

Major Ross then directed Brown, the agent of claimant, to be prepared to furnish the full quantity of fuel oil requirements of the Quartermaster Department. (R. 1.)

Repeated demands were made by Major Ross that claimant furnish more storage for fuel oil at Baltimore, but Brown informed him that steel

plates with which to erect tanks could not be obtained on account of the war. Major Ross then ascertained that claimant owned storage facilities at Carteret and demanded that they be removed to Baltimore. (R. 2.)

On April 7, 1918, Major Ross, in a conversation with officers of claimant at New York, informed them that the Quartermaster Department was short of fuel oil at Baltimore, and that it was impossible to increase the facilities there without additional tankage; that unless its tankage at Carteret was removed to Baltimore the Department would seize it and remove it as an exigency of war; but if claimant was willing itself to transfer these tanks on behalf and for the use of the Government, such action would be satisfactory to the Department. Major Ross further assured claimant that all expense incurred and all losses sustained would be paid by the Government. (R. 2.)

Claimant informed Major Ross that the removal of the tanks would mean the destruction of its business at New York, but Major Ross then stated claimant would be compensated for all loss and damage and that failure to remove them would result in the Department itself doing the work. (R. 2.) He desired, however, that the work should be done by the claimant. (R. 3.)

Claimant was convinced that Major Ross was acting within the scope of his authority, because theretofore, whenever he had given verbal orders to Brown, claimant's agent at Baltimore, for the

same general purpose of obtaining purchase of fuel-oil supplies, they had been followed in due time with confirmatory written orders, and thereafter prompt payment had always been made for the oil so purchased. (R. 3.)

In fact the agent Brown, so it is alleged, was so accustomed to this that he had come to comply, without question, to every order, depending, however, upon future confirmation of such orders being made. (R. 3.)

Major Ross, on this occasion, stated in unequivocal language that, in making his demand, he was authorized to act for the War Department, and that written official confirmation thereof would be forthcoming from that Department. (R. 3.)

When, however, these confirmatory orders were not received by claimant, the attention of Major Ross was called thereto, who gave as reason therefor that it was an oversight, and promised they would be forthcoming at once from Colonel Kimball. (R. 4.)

Later, Major Ross stated that he had made out the orders and had delivered them to Colonel Kimball, who, he said, would sign and deliver them to claimant as evidence that proper official authority was being exercised. (R. 4.)

They were never delivered, however, to the claimant, and Colonel Kimball left the service and went abroad because of ill health, and later died. (R. 4.)

The removal of the storage tanks was begun by claimant with all dispatch and was far advanced when the signing of the Armistice, November 11, 1918, made their use unnecessary for the purposes of the War Department, and they were not re-erected and in condition for use at Baltimore until February, 1919. (R. 4.)

The removal of the tanks from Carteret resulted, it is alleged, in claimant losing its right to reerect them at that place because of certain action by the legislature of New Jersey and the local authorities. (R. 4–5.) The items of damage claimed are set forth in the record at page 6 and total $3,575,457.73.

Claimant further avers that if, under the facts, it is not entitled to recover on the verbal contract, then in the alternative it claims that is is entiled to reasonable compensation for the services rendered and for the damage sustained by it in complying with the demands of the War Department in time of war in furnishing necesssary facilities for supplying fuel oil for the efficient conduct of the war. (R. 5.)

On April 25, 1924, a demurrer was filed by the United States to the petition on the ground that it did not state a cause of action. (R. 7.) On May 26, 1924, the court ordered that the demurrer be sustained and the petition be dismissed. (R. 7.)

THE CONTENTIONS

Appellant, in its brief, raises two points:

(1) That the verbal demands made upon claimant by Major Ross constitute a verbal con-

tract, and, there having been a partial performance by claimant thereunder, so it is alleged, Section 3744 R. S., does not apply to this case; and,

(2) That the action taken by Major Ross, even though not confirmed by his superiors, constituted a taking of private property for public use, for which the United States must pay just compensation under the Fifth Amendment to the Constitution.

The United States contends:

(1) There was no taking of appellants' property for public use.

(2) The pleading admits that the verbal orders and promises of Major Ross required the approval and confirmation of his superior officer, and fails to allege facts sufficient to show a contract or a breach thereof.

(3) The removal of the tanks did not amount to such performance of a contract not reduced to writing as makes the United States liable as upon an implied contract.

ARGUMENT

I

There was no taking of appellant's property for public use

Though a considerable portion of appellant's brief is devoted to an argument based upon the contention that it is entitled to just compensation under the Fifth Amendment for property taken, it is significant that the petition contains no allegation to that effect. The claim in the petition is (Par. XIII, R. 5) that it is entitled to recover

under a verbal contract, or, in the alternative, "reasonable compensation for the services rendered and for the damage sustained by it."

The record shows no exercise of dominion by the United States over any of appellant's property. It had a refinery and storage tanks at Carteret in New Jersey, and a refinery and storage tanks at Baltimore. Whatever was done was for the purpose of increasing its tankage at the latter place by transferring tanks from the former place. Though there is nothing to show the exact spot where the tanks were reerected, it does appear that they were reerected at Baltimore (Par. VIII, R. 4); that the solicitude of Major Ross was as to the amount of storage for fuel oil at the "refinery of the claimant at Baltimore" (R. 1), and the reason for the demand for removal was that claimant could not obtain material for the erection of additional tanks at Baltimore (R. 3). The only fair inference is that the claimant removed its tanks from one of its plants and reerected them at its other plant, all for the purpose of increasing its ability to supply the needs of the Government at the latter place. If, by direction of competent Government authority, its tanks had been removed and reerected upon property belonging to the Government, or by the Government turned over to some other company, a different question might be presented. Had the claimant, refusing to comply with the Government's wishes, suffered its property to be commandeered, a different question would of course be

presented; but the appellant has at all times exercised complete ownership and control over its property to the exclusion of the United States, and, so far as the record shows, continued to own the tanks after they were moved to Baltimore, and continues to own them to-day as part of its Baltimore plant. Moreover, the theory of a "taking" is inconsistent with the claim that there was part performance of a contract.

It is alleged in the petition (Par. I, R. 1) that the entire plant of the claimant at Carteret was worth $440,000. The amount of recovery sought in the action is $3,575,457.73 (R. 6), of which the actual expense incurred in taking down the plant at Carteret, freight to Baltimore, and reerection at Baltimore was $53,697.21 (R. 6). Of course most of the elements of damage, as alleged, could not be recovered in a regular condemnation or commandeering proceeding. *Mitchell* v. *United States,* 267 U. S. 341; *Campbell* v. *United States,* 266 U. S. 368; *Bothwell* v. *United States,* 254 U. S. 231; *Sawyer* v. *Commonwealth,* 182 Mass. 245; *Lewis on Eminent Domain* (3rd Ed.), Section 727.

This bill of particulars of damage, however, shows that claimant's property was not taken by the United States. Apparently all that was done was that the claimant removed four of its oil tanks from one plant and reerected them at another. They have at all times been, and now are, the property of the complainant and not of the United States. They have not been destroyed, nor has

claimant been ousted from ownership or possession of them. The Government had undoubted authority to requisition oil tanks under Section 10 of the Lever Act of August 10, 1917, c. 53, 40 Stat. 276, 279. That Act provided for just compensation to be fixed in the first instance by the President; if the amount thereof was unsatisfactory, the owner was to be paid 75 per cent of the amount so fixed with right to sue for such additional sum as would make just compensation. That no requisition was attempted is shown by the absence of these familiar incidents. Furthermore, suit under that Act for just compensation must be brought in a United States District Court. *United States* v. *Pfitsch,* 256 U. S. 547; *Bedding Company* v. *United States,* 266 U. S. 491, 493.

In no sense can appellant's petition be regarded as stating a cause of action for just compensation upon a taking of property.

Appellant refers to Section 120 of the National Defense Act, June 3, 1916, c. 134, 39 Stat. 166, 213, empowering the President, through the head of any Department, to place an order. This Act obviously has no application. There is no allegation that the President, through the head of a Department, placed any order with the appellant, nor is there anything in the Statute which authorizes even the President to require any plant to be constructed or moved from one place to another, and, so far as we know, it has never been held that failure to obey a

verbal order of a subordinate officer of the Army is a felony under that Statute.

II

The pleading admits that the verbal orders and promises of Major Ross required the approval and confirmation of his superior officer, and fails to allege facts sufficient to show a contract or a breach thereof

A contract liability, express or implied, enforceable by the Court of Claims against the United States, can be created only by some officer of the United States lawfully invested with power to make such contracts or to perform acts from which they may be lawfully implied. *Eastern Extension Tel. Company* v. *United States,* 251 U. S. 355.

No Government official who is without authority to bind the United States by express contract can do so by implication. (*Beach* v. *United States,* 226 U. S. 243.) The right to sue the United States in the Court of Claims upon an implied contract means a contract *implied in fact. Sutton* v. *United States,* 256 U. S. 575.

Putting aside for the moment consideration of Section 3744 of the Revised Statutes, it is important to understand just what is and what is not alleged in the petition.

The allegations show conclusively that appellant always understood clearly that every order, request, or demand that Major Ross made required the written confirmation or approval of his superior officer, Colonel Kimball, even when such orders

were given in connection with the routine purchase of fuel oil. When considered together, the averments amount to nothing short of an absolute admission that Major Ross had no authority to bind the United States by verbal orders or at all. The power of approval, or review, or of confirmation necessarily includes the power to disapprove or disaffirm any action taken by a subordinate. The fact that no approval was forthcoming from April 7, 1918, the date of the alleged order (R. 2), to February, 1919, the date of the completion of the work (R. 4), indicates either disapproval by a competent officer in the War Department, or that the matter was never brought to his attention.

There is no allegation that during all this time any one of Major Ross's superiors was ever notified of what was going on, much less that he ratified it. The only allegations are regarding what Major Ross *said* he had done. There is nothing alleged to negative the inference that Major Ross's statements were merely the vain and boastful utterances of a subordinate officer prone to impress others with his importance and fancied authority. There is no allegation that Ross had authority; only that he *stated* that he had authority, and that appellant believed it.

Furthermore, there is no allegation that appellant relied upon the statements of Ross and acted upon the faith thereof. All the allegations are consistent with the theory that appellant's officers be-

lieved it to be good business to enlarge their plant at Baltimore by removing to it the tanks at Carteret, and saw in the talk of Major Ross a chance of having that work paid for by the Government.

Appellant asserts that it had been its practice to comply with the verbal orders of Major Ross for the purchase of fuel oil without awaiting written confirmatory orders, but obviously there was not very much risk in that.

But we have here an entirely different situation. The sale and delivery of routine supplies to the army is quite a different thing from the erection of a plant to manufacture those supplies. Such practice, too, is insufficient to establish that the appellant honestly believed that the verbal promises of the officer were sufficient to bind the Government, in view of the fact that both the officer and the appellant realized that written confirmation was necessary. At best all that can be said is that appellant knew that the authority of Major Ross was limited, that whatever he did or said must be approved by his superior officer, and that the appellant took the chance. In the absence of any direct allegation that appellant relied upon and acted upon the faith of these promises, the inference is strong that the officers of the appellant, shrewd business men, acted upon their own belief that the removal of the tanks to Baltimore would be advantageous to them, with a lingering hope, and perhaps with some confidence, that the Government would pay for the work.

The allegations of the petition are rather vague as to dates, but it does appear that 10 months elapsed between the alleged order and the completion of the work, and the very nature of the work shows that, necessarily, it involved considerable time. If the officers of appellant were actually relying upon the statements of Major Ross, knowing, however, that he was a mere subordinate whose acts were open to approval or disapproval by his superiors, it is inconceivable that, as time went by and approval was not forthcoming, they should not have taken the short trip to Washington or used the mail, telephone, or telegraph in an effort to find out just where they stood with the War Department.

In the absence of direct allegations necessary to show a contract and a breach thereof, the fair inference from the petition is that the purported promise alleged to have been made by Major Ross, that the Government would pay for all the expenses in connection with the removal of the tanks, was relied upon by the appellant merely as an expression of his opinion that the Government would bear the expense. In any event, it did not relieve appellant from its duty to ascertain the scope of Major Ross's authority in the matter. (*Floyd Acceptances,* 7 Wall. 666; *Whiteside* v. *United States,* 93 U. S. 247; *Hume* v. *United States,* 132 U. S. 406.)

The petition is, therefore, lacking in allegations necessary to establish a valid contract, either express or implied, or a breach thereof. Whatever

was said or done by Major Ross was without authority. It is not shown that anything he did or said was known to or ratified by any officer invested with power to bind the United States by word or by deed. It is not shown that the United States received any thing, benefit, or advantage as a result of the activities of Major Ross or of the appellant; nor is it shown that what was done by the appellant was done upon the faith of, or in reliance upon, the words or acts of Major Ross or anyone in authority.

III

The removal of the tanks did not amount to such performance of a contract not reduced to writing as makes the United States liable as upon an implied contract

Appellant argues that if it can not recover for the breach of an express contract, then it is entitled to recover for services rendered upon the theory that, though the contract was not reduced to writing, as required by Section 3744 of the Revised Statutes, it was partially performed. *Clark* v. *United States,* 95 U. S. 539.

This theory, of course, assumes that there was a contract valid and enforceable, except for the fact that it was not reduced to writing. It is settled beyond question that Section 3744, Revised Statutes, is a bar to suit for recovery upon any contract made with the War Department not executed in accordance with the provisions of that section (*Erie Coal & Coke Corporation* v. *United States,* 266 U. S. 518), unless, in some way, the bar has been

removed. It is said, however, that "performance" will remove the bar of that section, and that there has been such performance in this case. Four cases are cited by appellant (Brief, p. 6) as authorities in point.

(a) *Clark* v. *United States, 95 U. S. 539*

This was an appeal from the Court of Claims and arose out of an agreement made between the owner of a ship and an army officer, who agreed that the Government would pay $150 a day for use of the ship, and would pay for her if she should be lost on her trial trip. The vessel was in the hands of the Government for eight days and was lost. Suit was brought for her value and for her use for the eight days. This Court held that the Government was not liable for the loss, because the agreement was not reduced to writing, as required by the Act of June 2, 1862, ch. 93, 12 Stat. 411 (the source of R. S. 3744), but was liable for the use of the vessel for eight days. The Court said (pp. 541–542):

> The facility with which the government may be pillaged by the presentment of claims of the most extraordinary character, if allowed to be sustained by parol evidence, which can always be produced to any required extent, renders it highly desirable that all contracts which are made the basis of demands against the government should be in writing. * * *
>
> We do not mean to say that, where a parol contract has been wholly or partially exe-

> cuted and performed on one side, the party performing will not be entitled to recover the fair value of his property or services. On the contrary, we think that he will be entitled to recover such value as upon an implied contract for a *quantum meruit*. In the present case, the implied contract is such as arises upon a simple bailment for hire; and the obligations of the parties are those which are incidental to such a bailment. The special contract being void, the claimant is thrown back upon the rights which result from the implied contract.

There was no question in the case as to the authority of the officer with whom the contract was made, and the point of the case is that the express contract including indemnity for loss of the vessel was void, but there was a contract implied *in fact* as upon a simple bailment for hire of the ship, because the vessel was used by the Government for eight days. The only allowance was for benefits actually received by the United States under the implied contract.

The recovery for the use of the vessel was at the rate of $150 a day, the agreed price, but this was allowed, not because it had been agreed upon, but because, as the Court said (p. 543):

> This value, in the absence of any other evidence on the subject, may be fairly assumed at what was stipulated for in the parol contract. Though not binding or conclusive, it may be regarded as admissible evidence for that purpose.

Citing *Browne, Statute of Frauds*, sections 117–130.

(b) *Harvey* v. *United States, 105 U. S. 671*

This case also was an appeal from the Court of Claims. It was heard by that court under a special Act of Congress which empowered the Court of Claims to reform the contract in question according to principles of equity, and to render judgment upon it as reformed. It has no bearing upon the present case, and involved no question of the power of a contracting officer or of payment by the United States for anything except benefits actually received and accepted.

(c) *United States* v. *Andrews, 207 U. S. 229*

This case also was an appeal from the Court of Claims. The suit was for the contract price of paper purchased by the War Department for use in the public printing office in the Philippine Islands. There was a letter from the Department to the claimant asking if it would furnish the paper, and a reply offering to furnish, and a letter accepting the proposal. The paper was to be shipped according to instructions. Instructions were followed and the paper shipped, but it was damaged in transit. This Court held that delivery by the consignor to a common carrier, according to instructions, and *acceptance by the consignee* or his agent of bills of lading issued by the common carrier for the goods, constituted delivery. There

was no question of the authority of the army officers to make the contract, and the paper having been, in contemplation of law, delivered to and accepted by the United States, claimant was entitled to payment.

(d) *United States* v. *N. Y. & Porto Rico S. S. Co., 239 U. S. 88*

This case held merely that failure to comply with Section 3744 of the Revised Statutes did not bar the United States from maintaining an action for breach of contract. The section did not make the contract *void,* but only unenforceable *against* the United States.

In *St. Louis Hay & Grain Company* v. *United States,* 191 U. S. 159, an appeal from the Court of Claims, the Grain Company tried to take advantage of the illegality of a parol contract for the sale of hay to the United States, so as to recover, upon *quantum valebat,* more than the contract price of the hay, after it had been delivered and paid for, that is, after the contract had been fully performed upon both sides. In deciding against this contention, the Court said (page 163):

> When a lawful transfer of property is executed it does not matter whether the terms of the execution were void or valid while executory; the transfer can not be revoked or the terms changed. A promise to make a gift does not bind, but a gift can not be taken back, and a transfer in pursuance of

> mutual promises is not made less effectual by those promises or by the fact money was received in exchange. The contract may be void, as such, but it expresses the terms on which the parties respectively paid their money and delivered their goods.

There is nothing in these cases which gives color to the claim that an order given or a promise made by any officer of the army imposes liability upon the United States merely because the person to whom the order was given obeyed it. The principle to be deduced from the cases is that of a contract implied in fact. To bind the United States and to take the case out of Section 3744 of the Revised Statutes there must be such performance and such conduct on the part of both parties as gives rise to a contract implied in fact (compare *Baltimore & Ohio R. R. Co.* v. *United States,* 261 U. S. 592), such as delivery to and acceptance by the United States of property, as in the *Andrews case;* or the use by the United States of a ship under circumstances amounting to a common-law contract of bailment, as in the *Clark case.* And the acts of the Government officials must be those of officials lawfully invested with power to perform those acts (*Eastern Extension Tel. Company* v. *United States,* 251 U. S. 355) for the limitation upon the authority to impose contract obligations upon the United States is as applicable to contracts by implication as it is to those expressly made (*Sutton* v. *United States,* 256 U. S. 575).

Section 3744, Revised Statutes, is to be regarded as a Statute of Frauds (*Clark* v. *United States,* 95 U. S. 539). The decisions of this Court which have permitted recovery against the United States after performance, notwithstanding Section 3744, show an intention to follow in general the rules which have usually been applied to cases arising under the original Statute of Frauds (29 Car. II, c. 3) as reenacted in various forms in this country. In the original statute (Sec. 17), relating to the sale of goods, wares, and merchandise, as in most of the statutes of the States, acceptance of the goods made the written memorandum unnecessary. The analogy of the *Andrews* and *Clark cases, supra,* is obvious. Where the contract has been in fact completely executed on both sides, the rights, duties, and obligations of the parties resulting from such performance, stand unaffected by the statute. (*Browne, Statute of Frauds,* 5th Edition, § 116, and cases there cited.) Such was the *St. Louis Hay & Grain Co. case, supra.*

But where the statute is mandatory, and there has been performance on one side only, and the person to be charged pleads the statute, the liability is only for property or benefit received and held by him. The rule is well stated in *Boone* v. *Coe,* 153 Ky. 233, a leading case.

In that case, at page 238, the court quotes with approval the following rule from 29 Am. & Eng. Encyc. of Law, 836:

"Although part performance by one of the parties to a contract within the statute of frauds will not, at law entitle such party to recover upon the contract itself, he may nevertheless recover for money paid by him, or property delivered, or services rendered in accordance with and upon the faith of the contract. The law will raise an implied promise on the part of the other party to pay for what has been done in the way of part performance. But this right of recovery is not absolute. *The plaintiff is entitled to compensation only under such circumstances as would warrant a recovery in case there was no express contract, and hence it must appear that the defendant has actually received or will receive some benefit from the acts of part performance.* It is immaterial that the plaintiff may have suffered a loss because he is unable to enforce his contract." (Italics ours.)

And also the following from *Browne on Statute of Frauds,* Section 118–a:

The rule that, where one person pays money or performs services for another upon a contract void under the statute of frauds, he may recover the money upon account for money paid, or recover for the services upon a *quantum meruit,* applies only to cases where the defendant has received and holds the money paid or the benefit of the services rendered. It does not apply to cases of money paid by the plaintiff to a third person in execution of a verbal contract between the

plaintiff and defendant, such as by the statute of frauds must be in writing.

(Citing cases in support of the rule.)

Compare *Dunphy* v. *Ryan*, 116 U. S. 491.

What this Court has said of the effect of performance of contracts not executed in accordance with Section 3744, when considered in the light of the facts involved, is consistent with this rule under the Statute of Frauds. No recovery has been permitted except for property actually used by the United States or for goods delivered and accepted.

Where a contract is made by officers of the United States not authorized to make it, the mere receipt by the United States of benefits is not enough to impose liability. (*Camp* v. *The United States*, 113 U. S. 648.)

Acceptance of the appellant's contention would mean that anybody could recover against the United States merely because he has done something which an army officer told him to do, whether the officer was authorized to give the order or not, and whether or not any property was delivered to and accepted by the United States or any value received and retained by it. This would be wholly subversive of the principles stated so emphatically in *Eastern Extension Tel. Company* v. *United States*, 151 U. S. 355, and *Sutton* v. *United States*, 256 U. S. 575.

No cause of action under the Dent Act, March 2, 1919, c. 94, 40 Stat. 1272, is stated, for it is not

alleged that appellant presented its claim to the Secretary of War within the time limited by the Act.

CONCLUSION

Appellant can not recover for property taken, for none was taken:

Nor upon express contract, for it was not in writing as required by § 3744, Revised Statutes, even if an express contract has been sufficiently pleaded:

Nor upon an implied contract resulting from performance, for there has been no such performance as raises the implication:

And these are the only possible grounds of recovery.

The judgment of the Court of Claims should be affirmed.

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DECEMBER, 1925.

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SUPREME COURT OF THE UNITED STATES.

No. 115.—October Term, 1925.

The Interocean Oil Company, Appellant, *vs.* The United States. } Appeal from the Court of Claims.

[March 1, 1926.]

Mr. Chief Justice Taft delivered the opinion of the Court.

This is an appeal from a judgment of the Court of Claims entered May 26, 1924, sustaining a demurrer filed by the United States, and dismissing the petition upon the ground that it does not state a cause of action. The facts stated in the petition are as follows:

The appellant, the Interocean Oil Company, was in 1918 and before, engaged in refining, transporting and dealing in petroleum and petroleum products, chiefly fuel oil, at Carteret, New Jersey, where it owned and operated a refinery and storage tanks. It also had a refinery at Baltimore, Maryland. During the War, the corporation was represented in Baltimore by Harold F. Brown in the sale of oil to the Shipping Board and the United States Navy. Brown made arrangements with Major Ross of the Quartermaster's Department of the United States Army, acting under the direction of Colonel Kimball, in charge, for the purchase by that department of fuel oil for army transports. After experiments made under the direction of Major Ross, a satisfactory grade of fuel oil was obtained by mixing the heavy gravity oil of this oil company with the light gravity oil of the Standard Oil Company. Major Ross then directed Brown to be prepared to furnish the full quantity of fuel oil required by the Quartermaster's Department. Ross complained that there was not enough storage for fuel oil at Baltimore. Brown advised him that the steel plates with which to erect the tanks could not be obtained on account of the War. Ross, finding that the Company owned storage facilities at Carteret, demanded that they be removed to Baltimore. In a conversation in April, 1918, Ross advised the officers of the company that the

Quartermaster's Department was short of fuel oil and that there must be additional tankage, and that unless the tankage at Carteret was removed to Baltimore, the Department would seize it and remove it itself as an exigency of war; but that if the claimant was willing itself to transfer the tanks, it would be satisfactory to the Department, and that all expense incurred and all losses sustained would be paid by the Government. The Company's officers advised Ross that the removal of the tanks would mean the destruction of its business at New York, but Ross said it would be compensated for all its loss and damage and that failure to remove the tanks would result in the Department itself doing the work. The officers of the Company were convinced that Ross was acting within the scope of his authority, because theretofore when he had given verbal orders to Brown for fuel oil, they had always been followed in due time by confirmatory written orders, and thereafter prompt payment had been made for the oil purchased. Indeed so accustomed was Brown to this that he had complied without question with every order, depending upon the future confirmation of it. In respect to the movement of the tanks, Ross said that he was authorized to act for the War Department, and that written official confirmation thereof would be forthcoming from that Department. When Ross's attention was called to the fact that these confirmatory orders had not come, he said it was an oversight and promised they would be forthcoming at once from Colonel Kimball. Later he said he had made out the orders and delivered them to Colonel Kimball, who would sign them as evidence that proper official authority was being exercised. They were never signed or delivered, however, and Colonel Kimball left the service and went abroad because of ill health, and later died. The removal of the tanks was begun by the Company with all dispatch, and it was far advanced when the Armistice was signed November 11, 1918. This made their use unnecessary for the purpose of the War Department. They were not re-erected and in condition for use at Baltimore until February, 1919.

The petition averred that the removal of the tanks from Carteret resulted in the claimant's losing its right to re-erect them at Carteret because of action of the legislature of New Jersey and the local authorities. The items of damage included the actual expense incurred in taking down the plant at Carteret and its freight to Baltimore, and its re-erection there, which amounted

to about $54,000. The claim made also included an item for the depreciation in the plant at Carteret of $220,000 and one for the loss of franchise to conduct business at Carteret and the profit on the probable sales of oil at Carteret for five years from April, 1918 to October, 1923, which was put at $2,300,000.

It is contended on behalf of the claimant that the Government got the benefit of the contract made between Ross and it, that it had the right to rely on Ross's authority, and that performance of the contract saved the necessity of a written agreement as required by Rev. Sts., sec. 3744. The petition set forth no facts upon which the United States can be said to have made any contract, whether oral or written, with the claimant company. There is no averment that Major Ross was authorized to make the contract upon which suit is brought. The averments are only that Ross told the officers of the company that he had the authority to make the contract, and that there would be a written confirmation by his chief, Colonel Kimball. It is expressly admitted that no such written confirmation by Colonel Kimball was ever signed or delivered to the company. The necessary effect of the lengthy averments of the petition is that Ross did not have authority to make a contract for the Government such as that sued on, but that the authority was vested in Colonel Kimball and that until Colonel Kimball signed the contract, it did not bind the Government. All the statements of the petition united together are no more than to say that the company relied on the promise of Major Ross that Colonel Kimball would confirm the contract which Ross proposed to make and said that he had authority subject to Kimball's confirmation to make. But Kimball never confirmed it.

Nor is there any implied contract binding upon the Government. The Oil Company was dealing with its own property in moving it from Carteret to Baltimore, and when the tanks were removed to Baltimore, they still belonged to the company for use by it not only in storing oil for the Government but for anyone else. There was no enrichment of the Government to its knowledge, no benefit in the form of property given to it or of service rendered to it from which the contract by it to pay could be implied. The Court of Claims was right in sustaining the demurrer, and the judgment is

Affirmed.